United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2221

To be argued by
MORTIMER TODEL

In The

United States Court of Appeals

For The Second Circuit

CHARLES DeFELICE, a minor under the age of 21 years, by his mother GERTRUDE DeFELICE, PETER A. DUNN, a minor under the age of 21 years, by his mother, ELLEN DUNN, YVETTE HARRISON, a minor under the age of 21 years, by her mother SUSIE HARRISON, GEORGE IRISH, JR., a minor under the age of 21 years, by his father, GEORGE J. IRISH, VILMA MORAN, a minor under the age of 21 years, by her father PEDRO MORAN, ALFREDO A. RAMOS, a minor under the age of 21 years by his mother, ALFRIDA RAMOS, on behalf of each and on behalf of all others similarly situated,

Plaintiffs-Appellees,

- against -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, MURRAY BERGTRAUM, President of the Board of Education of the City of New York, HARVEY B. SCRIBNER, Chancellor of the Schools of the City of New York, IRVING ANKER, Superintendent of Schools of the City of New York, JACOB ZACK, Assistant Superintendent in Charge of High Schools of the City of New York, and HILLERY C. THORNE, Director of Central Zoning of the Board of Education of the City of New York,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES

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74-2221

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES DeFELICE, a minor under the age of 21 years, by his mother GERTRUDE DeFELICE, PETER A. DUNN, a minor under the age of 21 years, by his mother, ELLEN DUNN, YVETTE HARRISON, a minor under the age of 21 years, by her mother, SUSIE HARRISON, GEORGE IRISH, JR., a minor under the age of 21 years, by his father, GEORGE J. IRISH, VILMA MORAN, a minor under the age of 21 years, by her father, PEDRO MORAN, ALFREDO A. RAMOS, a minor under the age of 21 years, by his mother ALFRIDA RAMOS, on behalf of each and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, MURRAY BERGTRAUM, President of the Board of Education of the City of New York, HARVEY B. SCRIBNER, Chancellor of the Schools of the City of New York, IRVING ANKER, Superintendent of Schools of the City of New York, JACOB ZACK, Assistant Superintendent in Charge of High Schools of the City of New York, and HILLERY C. THORNE, Director of Central Zoning of the Board of Education of the City of New York,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLEES' BRIEF

ISSUE PRESENTED FOR REVIEW

Whether the District Court was correct in holding that the existing zoning of the Franklin K. Lane High School district constituted de jure segregation.

STATEMENT OF THE CASE

Six students attending Franklin K. Lane High School, - two white, two black and two Spanish speaking - through their parents commenced on May 3, 1971 a class action for injunctive relief and declaratory judgment pursuant to Title 42 U.S.C. 1983 and Title 28 U.S.C. 2201. They sought on their behalf and on behalf of those similarly situated to void the existing zone of Lane High School. They alleged that the Appellants failed to alter the Lane Zone lines thereby creating de jure segregation in said zone. They further alleged that the educational services necessary for the servicing of the Lane students in such a setting were insufficient resulting in a detriment to their health and education, and to those similarly situated. (11a)*

The Appellees moved by order to show cause on May 3, 1971, for a preliminary injunction to enjoin further enforcement of the zoning of Lane High School and to compel rezoning under Court supervision. (16a) On June 21, 1971, the Appellants moved for summary of judgment. (22a) On April 10, 1972, the

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* Indicated numbers in parentheses refer to Appellants' Appendix. The numbers followed by (a) refer to pages at the beginning of Appellants' Appendix Volume I. The numbers not followed by (a) begin after page 78a of Volume I and continue through Volume IV.

District Court denied both Appellees' motion for preliminary injunction pendente lite and the Appellants' motion for summary injunction in a memorandum and order (72a - 78a).

On May 5, 1972, pursuant to the order of April 10, 1972, a hearing was held (1-58). A trial was held on December 13-15, 18-19, 1972 (59-905). The testimony of the hearing of May 5, 1972, and exhibits on motion for summary judgment were made part of the trial record (60).

On May 16, 1974, in a Memorandum and Order the District Court ordered the Appellants to submit a plan for redistricting of Lane High School holding that "The case is one in which the unmistakably advertent action of the Board over the years has countenanced and sought to compensate for a known and intensifying racial and ethnic unbalance in Lane, but has failed to accord the school districting that can be justified by any standard relevant to educational or neighborhood or geographical considerations or to overriding community interests or to continuity in education." (906-929)

On August 8, 1974, after two public hearings held by the Board on the plans for redistricting Lane, and Court hearings on August 2, 1974 and August 5, 1974 (933-1249) at which the public had an opportunity to express their opinions, the District Court ordered the redistricting pursuant to a plan submitted by the Board of Education, modifying said plan as to time of implementation (1250-1274).

The Appellants' appeal, contending that "the ethnic composition of Lane High School District changed gradually over a ten-year period due to changes in the housing patterns within tne Lane district". The Appellants contend that "the District Court applied an erroneous legal standard in determining that this failure of the Board of Education to change long existing zoning of the Franklin Lane High School District constituted de jure segregation."

THE FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

There is no genuine issue as to whether or not Lane High School is a segregated institution. (See statistics cited in Appellants' brief, pp. 7-8) Furthermore, there is no dispute as to the deprivation suffered by students who attend Lane High School District. As Appellants state on page 4 of their brief, the trial that was conducted was one as to liability. The Plaintiffs-Appellees at the trial subpoenaed employees of the Board of Education; namely, Morton Selub, Principal of Franklin K. Lane High School (11); Harold Saltzman, a teacher of Franklin K. Lane High School from 1959 to date (135); James Baumann, a teacher at Franklin K. Lane High School since 1967 and a long time resident in the Grover-Cleveland High School zone, having himself graduated from Grover-Cleveland High School (244); Hillery C. Thorne, Director of Central Zoning of the Board of Education (178); Irving Anker, Superintendent of Schools of the City of New York (257); and Harvey B. Scribner

Chancellor of the Schools of the City of New York (386).

The defendants-Appellants called one witness; namely, Jacob Zack, Assistant Superintendent in Charge of High Schools of the City of New York (431).

Morton Selub, Principal of Lane High School described the very limited programs for Lane High School students, and that the educational task which had to be done could not realistically be done to meet the needs of the overwhelming deprived students who attend Franklin K. Lane High School (1-58).

The only real issue to be determined by trial was whether or not the defendants by their actions or inactions failed in their duty to alter the zone lines so as to facilitate the establishment of an integrated school system in the Lane High School District, and whether or not by their failure to do the above, they have created and maintained de jure segregation in the Lane High School District. The Court, after tiral, ordered the desegregation of the Lane zone (1250).

In consideration of the preliminary injunction and motion for summary judgment in 1972, the ethnic distribution of school population in the Lane Zone and the contiguous Queens zones was before the Court and the affidavits clearly spelled out the problem (16a-78a). The District Court in its Memorandum and Order for Judgment dated August 8, 1974, stated as follows:

> "The institution of the present suit and the perfectly clear decision in the present case in April of 1972, should as a matter of course, preferably in September of 1972, certainly

in September of 1973, and necessarily in September of 1974 have resulted in either the voluntary rectification of the Lane situation or - now - an aggressive and specific commencement upon the task of eliminating the invidious discrimination (quote omitted)" (1265).

"... the principles were perfectly implicit and should not have required any further judicial intervention in the light of the Board's alertness in the past to the obvious implications of its segregation problem and the known attitudes of the State Commissioners of Education over the last dozen years" (1266-1267).

The excerpts from the testimony of the witnesses which follow below, although quite lengthy, bear directly upon and zero in on the factual issues of creating and maintaining a segregated zone, as well as on the action and inaction of the Appellants, their intent and the foreseeability of their action or inaction.

Morton Selub, Principal of Lane, testified as follows:

(28) Q. Since you have been at Franklin K. Lane High School as Principal, has any part of the district which included Queens or the white population of Queens, been taken out of the Lane district?

A. Yes. Back, I think it was in 1969. The then acting superintendent of the high schools, Dr. Nat Brown, was entertaining a proposal for a zone change which would have gone further into Woodhaven and Ozone Park.

There was a great deal of resistance from the communities there. And that zone change never took place but in the process of considering that zone in some way or other, I don't know it happened.

We lost a part of the Forest Park Co-op which is in the northeast corner of our zone on the

Queens side. It was a comparatively small area.

Unfortunately, it lopped off a group of students who, I think, about 70 or 80, who formed the backbone of some of our special offerings; honor classes, creative writing, chemistry, physics courses. *

I don't know how it happened but suddenly one day they were there and suddenly they were gone. They had been agitating to be removed from the zone and they they were --

* * *

(69) Q. I believe you testified in May that you have been principal of Franklin K. Lane since approximately 1967 and 1968?

A. September, 1967.

Q. And during the course of your being principal of the school, have you had discussions with the superintendents, assistant superintendents, or Board of Education, with reference to the problem as to the zoning of Franklin K. Lane students?

A. Yes, on various occasions.

* * *

(73) Q. Do you know with whom you spoke to, with reference to rezoning of Lane?

A. Yes. I would not say that this was a meeting on zoning, but Deputy Chancellor Anker was at Lane when we were in the midst of very severe difficulties. He was then the superintendent, I believe, and we raised the question.

THE COURT: Now, this was when?

THE WITNESS: This was in 1969, in the winter. I would say either January or February, probably January.

THE COURT: Of '69?

THE WITNESS: Yes, sir.

---

* Mr. Thorne testified there were only 13 children in the Forest Park Co-op (201).

Q. And what was said to Mr. Anker?

A. We raised the question, not only I, but others who were at the meeting, and there were a number of teachers, and I believe that Elizabeth O'Daley, who was the superintendent of District 19, was present. We raised the question of relief for Lane and rezoning to include part of Queens, and there was an indication that they would look into the problem. Shortly afterwards, superintendent Nathan Bram, who was Mr. Anker's superior, decided that no such change could be taken because there was opposition from the people in Queens who would have been zoned in.

* * *

(74) Q. Was this in the spring of 1969?

A. Yes, it was.

Q. And was this held at the Board of Education or was it held at Franklin K. Lane High School?

A. No, Mr. Brown was at Franklin K. Lane, where he indicated to me in the presence of others who -- there were a number of people there. He indicated that the people in Woodhaven had registered very strong objections, and that meeting incidentally, although we were not rezoned for Queens, we were rezoned a trifle more out of Queens.

Following Mr. Selub's testimony, Harold Saltzman testified to his knowledge as to efforts made to rezone Lane.

(136) Q. Who was Dorothy Bonowit?

A. She was the Queens High School field superintendent who was Mr. O'Connell's immediate superior.

Q. You say she was a Queens High School --

A. Lane was administrered as a Queens high school in those days.

Q. That was in 1964?

A. Yes.

Q. Did it receive students from Queens at that particular time in 1964?

A. Yes, it did.

Q. What sections of Queens?

A. In primarily Woodhaven, but also Ridgewood, Glendale, Richmond Hills, Kew Gardens and Ozone Park and Lindenwood.

Q. Did you have any conversations with anyone else in the Board of Education in 1964?

A. There were meetings that had been set up with Mr. O'Connell, the former principal, the late Mrs. Bonowit, Carl Golden, who was then UFT Chairman in the school, and assistant superintendent Gerald Landers. A study was made by the Teachers' Committee, 1964 and early '65, entitled Statement of Problem and Nature of Complaint, in which the Committee did an investigation of the zoning of the school, the feeder patterns, and pointed out that the peculiar way that Lane had been zoned would lead to resegregation of the school. [Emphasis added].

Q. When you started to work at Franklin K. Lane in 1961, about what percentage of the students were black and Puerto Rican, and what percentage were white?

A. In 1960, the ethnic balance was 76 percent white. In 1964 it had dropped some 23 percent, because of zoning changes that had been put in there, and it was down to 51 percent.

* * *

(138) Q And your conversation with Mrs. Bonowit or the principal of the school, what did you say to them with reference to zoning?

A. We indicated back in 1964 that unless changes in the zoning were implemented, Lane would were soon be a reversely segregated school, because an increasing number of youngsters with severe educational handicaps -- the previous witness testified had been coming into the school, and if that pattern continued, we would end up with a segregated school.

Q. Did you make any recommendations to the Board of Education?

A. Yes, we did. We recommended, we laid out transportation guides back in 1964 and early '65, in which we indicated how easy it would be for moderate zoning changes to be made.

Q. What moderate zoning changes?

A. We recommended that students in the extreme western half of the zone in Brooklyn could be zoned to other schools in Brooklyn, and we recommended that students in areas such as Glendale and Ozone Park and Richmond Hill could very easily be zoned to Lane.

Q. Did you make any recommendations with reference to Queens?

A. Yes, we did. We recommended that students had previously lived -- what had been the John Adeams - Grover Cleveland area could be zoned to Lane.

Q. After 1965, did you have any conversation with anyone in the Board of Education?

A. There were ongoing discussions through '65, '66 with Assistant Superintendent Elizabeth O'Daley was the District Superintendent, and at the time I was the United Federation of Teachers representative for District 19, and I met with Miss O'Daley very frequently, discussing the matter of zoning with Lane High School.

Q. And was the zone of Lane High School changed in any fashion?

A. No, it was not.

* * *

(156) Q. In the spring of 1969 did the Board of Education have any plans that you were made aware of for the rezoning of Lane District.

A. Yes, we had met with the then executive director superintendent of schools Nathan Brown and we had impressed upon Dr. Brown the importance of zoning issue at Lane being resolved once and for all, and he agreed with teachers and parents that he had met with that a change should be implemented and that the Lane zone had to be corrected to shorten its extension on the Brooklyn side and to extend it a little further into Queens to provide racial balance at the school.

Q. Was there any discussion with Mr. Brown with reference to what part of Queens would be zoned into?

A. The plan that Mr. Brown proposed was an extension of Ozone Park, Lindenwood section of Queens which is contiguous with the Woodhaven section of Queens.

Q. And did that plan go into effect?

A. The plan did not go into effect.

* * *

(157) Q. Were you advised by Mr. Brown as to why the Board of Education did not put this plan into effect?

A. Yes, I was. Dr. Brown tells us in writing because of the pressures that had been exerted in those areas, political pressures, that he could not --

* * *

(160) Q. After you had received this letter from a Dr. Brown, Mr. Saltzman, did there come a time when you spoke with Dr. Brown?

A. Yes, towards the end of May. It was reported in the press that the Board of Education had decided to drop that zoning plan and I called Dr. Brown as soon as I read about it in the newspapers and I asked him what happened. He became quite angry and indicated that he had been receiving lots of protest letters and telegrams, phone calls from

people in Queens who are opposed to the idea of that plan. As a result of these pressures the Board would not go ahead with it.

* * *

(177) Q. Mr. Saltzman, in 1965 you testified that time some proposal had been made to the Board of Education; is that correct?

A. Yes.

Q. And at that time you had suggested not only the transfer of children from the Lane district to Richmond Hill and John Adams but also to the north, this would be the northwest, Grover Cleveland; is that correct?

A. Yes, we did. The proposals that were made back in 1964-65 indicated that it would be logical to extend the zone towards Glendale and Ridgewood, and that was after that very inept study that had been done by the teachers' committee in 1964-65. And the line of transportation to Grover Cleveland from the area on the western portion of the Lane district, there are transportation lines available.

Q. And there are transportation lines available from Glendale to Franklin K. Lane?

A. Absolutely, very convenient ones.

Q. And from Richmond Hill to Franklin K. Lane?

A. Absolutely, Jamaica Bus and el travel right along there.

Q. The students who travel to Lane today from various parts of the Lane district, do they use more than one means of transportation?

A. Large numbers of students have to take two trains, the BMT and IND in order to get to Lane, and some have to take the train and the bus, the youngsters from the western end of the district.

Another teacher, James Baumann, was called who described in detail for the Court the various means of transportation available for students who reside in Brooklyn and Queens relevant to

the issues in this case (244-257). The defendants at first objected to his testimony but were overruled. The Court stated:

> THE COURT: I think the argument you make if this comes down to a question of reviewing discretion, that has been exercised without invidious standards being invoked, that then we are way behind the proprieties of the case. But as I understand Mr. Todel's approach at this point, he's concerned to show that the present line which he suggests is discriminatory is not saved from invidious discriminatory methods by considerations of transportation and other necessities because if it turned out that it was a Berlin Wall that existed somewhere, well it would explain what it explained or why and perhaps to some extent an automobile highway like Queens Boulevard or Adams Street which is almost impossible to cross on foot unless you have nine lives (250).

Transportation (busing) or location are not issues in this case. In fact, the defendants-appellants in their motion for summary judgment attached Exhibit V to their motion which clearly states on page 4 of said exhibit: "In the case of high school students in Queens, travel to school by bus or common carrier is already a way of life for many students. (42a)

Mr. Thorne, Director of the Zoning for the Board of Education, testified with reference to the criteria used in the zoning of districts, clearly, revealing ability to draw new zones if ordered to. He testified in part as follows:

(183) Q. And an important criteria would be the availability of transportation facilities. You are familiar, I take it, with the Lane zone district, are you?

A. Yes, among the other high schools, twenty-two high schools.

Q. And it's filled with transportation facilities; is that correct?

A. Yes.

Q. Subways, independent line, BMT, bus routes?

A. That's right.

Q. Are you familiar with Grover Cleveland zone district?

A. I am.

Q. And that entails Glendale, Ridgewood and also with reference to the Richmond Hill and John Adams district; is that right, and all of these districts have sufficient transportation facilities, is that correct?

A. Yes.

Q. Did you know at one time stydents who live in Glendale, Ridgewood, Richmond Hill went to Lane High School?

A. Yes.

Q. And today they dont't go to Lane high school; is that correct?

A. Yes.

Q. Now, in following the policy of the Board of Education with reference to criteria for zoning I take it in the last ten years, the furtherance of racial integration is an important part on the part of the Board of Education?

A. Very much, but in priority it does not outrange the other criteria.

Q. Now, with reference to Franklin K. Lane and where it's situated, it's right on the border between Brooklyn and Queens. I take it during the period of time that you were director of zoning or acting direct, Lane high school was considered as a Brooklyn school; is that correct?

A. We consider it a Brooklyn and Queens school. At one time it was supervised -- at present it's supervised by a Brooklyn supervisor of high schools, the now deceased Mrs. Donowit who was the Queens supervisor, was in charge of that school.

Q. So I take it then as you say you considered it a Brooklyn-Queens school, it doesn't participate or the Lane principal doesn't attend the Queens meetings of principals?

A. I should say it's considered more a Brooklyn school because of the feeder pattern.

Q. Feeder pattern?

A. The schools that feed into Lane are in the area, within the boundaries of Brooklyn.

Q. Is it feasible on the part of the Board of Education to change feeder patterns?

A. On recommendation, yes.

Q. Feeder pattern?

A. On recommendation of the parents and the communities in which those feeder patterns are, they are changed considerably.

Q. I take it then, I can understand that any administrative body does have a great deal of pressures brought upon it by the communities. As I take it, the Board of Education has considerable pressures brought upon it?

A. May I be facetious at the moment. I would say, yes, that's an understatement.

* * *

(195) Q. And is there any difficulty on the part of a zoning board like your particular group to change the zone of Lane to include Glendale or Ridgewood?

A. Along the basis of experience which I mentioned, the chief barrier to that would be, of course, would be the objections of the parents of children who would be involved in that move.

* * *

(201) Q. In 1968 and 1969 there used to be a part of the Lane high school zone district called the Forest Park which involved a number of cooperatives and so on, were there community groups involved in that?

A. One group and that was the Forest Park group who wrote Dr. Brown asking that they have a meeting to plead for the admission of the children from that housing project into Richmond Hill. As I remember because of the small number of children and because of the arguments presented, I don't know, the arguments presented, thirteen children, thirteen new entrants were added, taken out of Lane and admitted to Richmond Hill.

Q. Was this a white cooperative?

A. I don't know what the complete tendency is but I believe that it was largely white.

* * *

Irving Anker, Superintendent of schools of the City of New York, was then called and testified as to the fact that zoning changes are made almost every year.

(267) Q. But the facts that schools may have been zoned in a certain fashion at one time, does the Board ever change zones around?

A. Yes, it changes almost every year.

Q. And would it be an important part of the criteria for changing a zone is to further racial integration?

A. Absolutely.

He then testified of the efforts of the Board of Education to build schools so that they can draw students from different ethnic areas (272). However, when he was questioned as to any plans for the Lane High School, he testified as follows:

(273) Q. Mr. Anker, maybe I did not make myself clear to you, maybe I'm misinterpreting what you did say.

I'm making the inference -- I may be correct, and I would like you to correct me if I'm not making the correct inference. You said putting Hillcrest where it was put and built was good because of the fact that it was able to draw black children which was just immediately south to that school?

A. I had nothing to do with placing that school where it is but I would say placing a school generally north of Hillside Avenue as was done with the last seven -- six or seven high schools in Queens, so that it could draw both black and white students is part of the objectives of the zoning policy for integration in New York City schools.

Q. Then it is one of the objectives?

A. Certainly.

Q. To draw children of different races and being able to educate them together; is that correct?

A. I think we have a very good record in that respect.

* * *

(274) Q. And are you aware in 1972 at Grover Cleveland High School there was a white or other population, school population of 85.8 percent?

A. I think that's approximately right. We don't have the official figures yet for the October date but it must be within a couple of percent of that.

* * *

(278) Q. Would you say, Mr. Anker, as you said a moment ago, I believe that Hillcrest was built more or less where it was built so it could draw a large part of the black population into that school; is that correct?

A. More easily would draw black population as far north as Bayside and Flushing High Schools even though there are very few blacks up there. However, it's easier for Hillcrest than the schools up north, the minority students don't travel as far.

be
Q. You would/familiar that Franklin K. Lane is located in an area which is almost completely a whi' area?

A. That's right.

Q. Many blocks in each direction?

A. Yes, sir.

Q. And here you have a situation where the mass of black and Puerto Rican are coming from the western end of the zone and here you have a mass of white or other student population. Has the Board ever thought in your period of time as Deputy Chancellor with the Board in terms of rezoning so that it could further the policy of the Board for racial integration?

A. We rezoned high schools of Queens and Brooklyn.

Q. Grover Cleveland and Franklin K. Lane?

A. I don't recall any specific plans that were drawn, no.

* * *

(282) Q. And during the period of time that you were an Assistant Superintendent, a Deputy Superintendent, a Deputy Chancellor, has there been any discussion, if you know, with reference to the rezoning of Franklin K. Lane and Grover Cleveland in view of the ethnic distribution of these two zones, so that the Board could further its policy of integration.

* * *

THE WITNESS: There was no report or memorandum which came to my attention in the last two years where I have been directly involved, but previous to that time I was not involved in that. I was identified with the Junior High Schools most of the time.

Q. During the period of time of your involvement on the level that you are at the present time, was there any discussion, if you know, with reference to changing the zone of Franklin K. Lane so that it would include part of South Ozone and Lindenwood?

A. You mean to extend south into Ozone Park?

Q. (Mr. Todel) That's right, and into the Lindenwood section. That's the area over here (indicating) which is part of the John Adams zone.

A. I don't recall that specifically but obviously there was discussion as to whether the Franklin K. Lane zone could be changed.

Q. And also being changed more eastward into part of Richmond Hill, any discussion about that?

A. I think there was, I don't recall of any specific memorandum on it.

Q. But no change was made; is that correct?

A. That's right, Richmond Hill High School has dropped.

Q. Was there a change or wasn't there a change?

A. There was no change.

* * *

(304) Q. Is Grover Cleveland zone located in Queens, is that a residentially segregated area?

A. It's an overwhelmingly white area.

Q. And Mr. Anker, there has been testimony here that the distances and the means of transportation from the western part of the zone of Franklin K. Lane to Grover Cleveland are available. There has also been testimony that the transportation facilities from Grover Cleveland's zone and Richmond Hill and even further zones north are available for students at Franklin K. Lane. Have you ever thought in those terms that the availability of these transportation facilities to further the policy of the Board, further integration?

A. I would say there are no absolute -- I won't issue any veto here either. I would like to point out however that is what is at stake when you and those you represent speak of the very high number of students at Lane and the possible inclusion of other whites is not raising the number

but moving substantial numbers of black students out if a very substantial number of black students moved out, giving the facilities today most of them would probably be forced to attend schools that are racially less well balanced than is. (*)

* * *

(325) THE COURT: I think there is one thing, there is one thing as we have gone along here has increasingly emerged from Mr. Todel's questioning and that is the question if there be a question as to whether all of these ideas have been discussed here have somehow or other not been applied to Lane. There has been a tendency to walk around Lane and to just leave it there and not make it the beneficiary, if that's what it is, the thing that Mr. Anker has been discussing in the last few moments here. I think that's why Mr. Todel has kept coming back to his specific comparison between Lane and Grover Cleveland and the contrast afforded what is being done and the grand planning typified for all purposes by the location and zone line of Hillcrest and by what he has said about adherent to the broad plan of building outside of the areas of ghetto areas but near enough to them so as to create reasonable zones, zones of reasonable geographic simplicity which would bring about mixed school population...

* * *

Harvey B. Scribner, Chancellor of the Schools of the City of New York, testified as to the problems of integration within the metropolitan areas, even in terms of looking beyond the boundaries of New York City into the suburbs. (396)

When questioned as to the responsibility of a Board in 1964 and 1965 in changing Lane area in the context of an almost all-white area across the line in Queens, he answered as follows:

(398) A. 1965 and 1964. '64-'65, that's very difficult for me to answer. I would assume, yes, that there was a responsibility there but, of course, I can only testify realistically to what's

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(*) The plan finally submitted by the Board pursuant to the District Court's order provided that students residing in the segregated area of the Western part of the Lane Zone would be assigned only to those schools that were neither integrated or were very predominantly made up of "other" population.(1255)

happening today to that area across the boundary into Queens.

He further testified as follows:

(417) Q. But if that was possible or feasible on the part of the Board of Education in reducing the number of Black children going to Franklin K. Lane and increasing the number of White children isn't this something which could be explored by the Board of Education?

A. Yes. Now, if you want to put it on an integration basis, then I have to say to you, sure. If we could cut Franklin K. Lane back from its 80 percent to something less than that, I think that's in the direction -- worth any exploration and a favorable goal which we ought to look then. Then you talk about feasibility. You have lots of other dominoes in that game that you have to look at.

* * *

Jacob Zack, Assistant Superintendent in Charge of High Schools was called by the defendants. He testified as to all that was done for the students at Lane as compared with high schools throughout the City. The District Court in its memorandum of May 16, 1974, aptly describes what is being done as it relates to zoning, as follows:

> "But the very emphasis given in the Board's evidence to what might be done at Lane, in addition to what is being done, hardly answers the zoning question that Lane presents. On the contrary, it rather emphasizes that Lane represents a place upon which imaginative programming must be trained simply because in some very considerable part, it has become the victim of zoning boundaries." (925)

A R G U M E N T

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE EXISTING ZONING OF THE FRANKLIN K. LANE DISTRICT CONSTITUTED DE JURE SEGREGATION

(1)

The Appellants base the appeal on their view that from 1937-1973, there was no substantial change in the geographical zone of Lane and that the District Court merely [illegible]d its ruling on the demographic changes that have oc[illegible]e in the City of New York, more specifically Brooklyn and Queens.

> "Judge Dooling found, on the basis of these undisputed facts, that 'repeated adherence over a long period of time to the Lane boundaries' constituted 'unmistakenly advertent action' by the Board of Education. . . He further held that the Franklin K. Lane High School district was a de jure segregated school district." (Appellants' brief p. 24-25)

The Appellants' brief at page 26 states that the Board of Education has no history of using racial discrimination for drawing school district zoning; at page 20, that the Board does not have a negative or neutral approach to the issue of racial policy; and at page 31 that the situation at Lane is bona fide de facto segregation. Based on the above, the Appellants submit that the District Court had applied an

erroneous legal standard in determining that a constitutional violation occurred.

The extended excerpts of testimony which appeared in the body of this brief were so inserted so as to give this Court a clear picture of the evidence as it unfolded to the trial court below, who is the finder of fact.

Without reviewing the evidence in detail, what was disclosed in the Court below, follows:

1. An awareness of the Board of the impending segregation of Lane dating back to 1964, the resulting segregation and extreme educational deprivation.

2. An awareness of the Board that though a small part of the Lane zone was in Queens, there was an extensive "other" population across the county line in Queens.

3. Although the Board considers the Lane High School not necessarily a Brooklyn school, it still is administered by a principal who is under the direction of a Brooklyn superintendent.

4. The feeder pattern of Lane is such that the Brooklyn intermediate and junior high schools feed into Lane and not into Queens. Except for the small eastern part of the Lane zone in Queens, no other part of the Queens' lower

schools feed into Lane High School.

5. Students who are desirous of opting out of the Lane zone cannot opt out to Queens High Schools.

6. The transportation facilities from the Lane zone to Queens High Schools are plentiful as well as, from Queens zones to Lane High School.

7. The very limited Board's plans to rezone Lane whereby parts of Queens would be zoned into Lane were not implemented because of pressures from the Queens community; however, a small part of Lane which contained "other" students was zoned into Queens.

8. The Board's policy is to change the geography of zones on a yearly basis, if necessary.

9. The Board has no problem in changing zones, except for the ability to withstand pressure from the areas involved.

10. Although it is the stated policy of the Board to build schools in areas which can draw different ethnic groups, such a policy was not made available to Lane when such readily "other" population was accessible in Queens.

The Court after hearing all the evidence, and after giving full recognition to the problems faced by the Board of Education, stated in its Memorandum and Order of May 16,

1974, as follows:

> "While there must be unqualified recognition of the immense difficulty which the Board of Education faces in rezoning schools, the conclusion is compelled that the Lane school district does not as it presently exists reflect equality of treatment with the other school districts which are in its region. It manifests unexplained and unwarranted imbalance in circumstances in which the composition of the district implicitly reflects failures to act upon recognized principles elsewhere applied in school zoning in the city. Repeated adherence over a long period of time to the Lane boundaries, continuing after the pendency of the present action had sharply drawn the situation to the attention of the Board, reinforces the conclusion that there must be a final order requiring the redistricting of Lane in such manner as substantially to redress the present imbalance. . . " (916)
>
> [Emphasis added]

* * *

> ". . .But the very emphasis given in the Board's evidence to what might be done at Lane, in addition to what is being done, hardly answers the zoning question that Lane presents. On the contrary, it rather emphasizes that Lane represents a place upon which imaginative programming must be trained simply and because in some very considerable part, it has become a victim of zoning boundaries. . ."
>
> (925) [Emphasis added]

* * *

> ". . .The case is one in which the unmistakably advertent action of the Board over the years has countenanced and sought to compensate for a

known and intensifying racial and ethnic imbalance in Lane, but has failed to accord the school districting that can be justified by any standard relevant to educational or neighborhood or geographical considerations or to overriding community interests or to continuity in education. . ." (pp 928-929)
[Emphasis added]

(2)

The Appellants take the position that bona fide de facto segregation may have existed in the Lane zone and that, therefore, there was no constitutional duty to undo said situation. To support this position, they stated that the Lane zone which was created in 1937 was not created as a segregated zone and, since that date, there have been little changes in the district lines. They stated that white students were never removed from the district and that the district became composed of many more minority families. They take the position that they did not create the segregated condition at Lane.

The responsibilities of a school board are clearly outlined by Mr. Justice Powell (concurring in part) in Keyes v. School District No. 1 413, U.S. 189, 227, 93 S.Ct. 2686, 2707 (1973), stated as follows:

"The school board exercises pervasive and continuing responsibility over the long range planning as well as the daily operations of the public school system. It sets policies on attendance zones, faculty employment and assignments, school constructions, closings and consolidations, and myriad other matters. School board decisions obviously are not the sole cause of segregated school conditions. But if, after such detailed and complete public supervision, substantial school segre-

> gation still persists, the presumption is strong that the school board, by its acts or omissions, is in some part responsible. Where state action and supervision are so pervasive and where, after years of such action, segregated schools continue to exist within the district to a substantial degree, this Court is justified in finding a prima facie case of a constitutional violation ... [Emphasis added]
>
> * * *
>
> It makes little sense to find prima facie violations and the consequent affirmative duty to desegregate solely in those States with state-imposed segregation at the time of the Brown decision."
>
> See also United States v. Texas Agency, 467 F.2d 848, 863 (5th Cir. 1972). "A school board is an agent of the State ... The actions of the [school board] are 'state action' for purposes of the Fourteenth Amendment ..."

Since 1964, according to the testimony, there was an awareness by the Board of Education of the impending segregation of Lane, an ability to change district lines and feeder patterns, yearly, if necessary, adequate transportation in and between Brooklyn and Queens, and a large "other" population in Queens. All that was necessary was a policy to go forward and an ability to withstand community pressures. The resulting de jure segregation

> "was not the result of a consequence of housing patterns helplessly submitted to you beyond the reach of feasible compensatory planning. Taylor v. Board of Education (2d. Cir., 1961) 294 F.2d. 36; United States v. School District, (7th Cir. 1969), 405 F. 2d. 1125, 1130-1131; Keyes v. School District No. 1, Denver, Colorado (10th Cir., 1971), 445 F.2d. 990, 999. Note Alexander v. Louisiana, U.S. Sup. Ct. 1972, 40 L.W. 4365, 4367." (76a)

As stated in Hart v. Community School Board of Brooklyn, N.Y. Sch. D. #21, at 383 F. Supp 699, 734 (EDNY 1974):

> "A school board which neglects to avoid racial segregation in its school is itself causing or bring about, as an agency of the state, racial segregation. This is so because a school board, like other legal entities, must be held accountable for the natural, foreseeable, and avoidable consequences of its activities and policies:
>
> 'The school board's responsibility of the creation and maintenance of imbalanced schools, even under the policies of approval or disregard, is derived from its deliberate choice to assign children to schools on the basis of geographic criteria when it knows that, given the ghettoized residential patterns, the implementation of this choice will yield racially imbalanced schools.'
>
> Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," 78 Harv.L.Rev.564 584 (1965).
>
> 'In this context, the pertinent action of the school board is its choice of a criterion for student assignments. The board decides how students are to be assigned. The result of using a criterion such as geographic proximity in a system with residential segregation is forseeable; and in most instances there are reasonable measures the board could adopt, if not eliminate, then at least to mitigate the result that flows from the use of that criterion ...'
>
> Fiss, "The Charlotte-Mecklenberg Case - Its Significance for Northern School Desegregation," 38 Chi. L.Rev. 697, 706 (1971)"

See also Bradley et al. v. Milliken et al., 484 F 2d 215, at 222 (6th Cir. 1973), cert. granted, 414 U.S. 1038, 94 S.Ct. 3312(1974; Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 149 (5th Cir. 1972), cert. denied, 413 U.S. 922, 93 S.Ct. 3052 (1973); United States v. Texas Education Agency,

467 F. 2d 848, 863 (5th Cir. 1972); Oliver v. Kalamazoo Board of Education et al., 368 F. Supp. 143, 180 (W.D. Mich. 1973); Hoots v. Pennsylvania, 359 F Supp. 807, 823 (W.D. Pa.1973); Johnson v. San Francisco Unified School District, 339 F. Supp. 1315, 1318-1319 (N.D.Cal. 1971); Soria v. Oxnard School District Board of Trustees, 328 F. Supp. 155, 157 (C.D. Cal. 1971); Spangler v. Pasadena City Board of Education, 311 F. Supp. 501, 521 (C.D. Cal. 1970).

A most concise statement which is so applicable to this Lane situation was made in Kelley v. Metropolitan County Board of Education, 317 F. Supp. 980, 986 (M.D. Tenn. 1970).

> ". . . that in fulfilling their affirmative duty to promote integration, school boards cannot automatically rely upon those residential patterns in maintaining present school zone lines or in establishing new attendance zones. It is true that a school board can do nothing about where the pupil population is located, but it is equally true that a school board can most certainly do something about where pupils attend school. It follows, therefore, that absent some other overriding consideration, a school board should alter old zone lines or draw new lines when a study of community residential patterns demonstrates that such action will facilitate the rapid establishment of a unitary school system. If such action is not taken under these conditions, the school board has failed to perform its constitutional duty. (citations omitted) . . . no concept of zoning, including the concept of "neighborhood school attendance zones " is constitutionally defensible if employed in such way as to minimize pupil integration of schools. (citation omitted) No zoning plan, "neighborhood" or otherwise, is acceptable which needlessly perpetuates discriminatory segregation. (citation omitted) Where such plans are employed in preference to other plans having more promise of achieving integration, such may indicate a lack of good faith on the part of the school board and at the very least

> "places a heavy burden upon the Board to explain its preference for an apparently less effective method." Green v. County School Board of New Kent County, Virginia, 391 U.S. 430, 439. . . ."

In Kelley, supra at page 989, the Court made the following statement which is applicable to the Appellants' reliance on the fact that there has been practically no change in the district lines of Lane since 1937:

> "Historic zone lines which purposely promote segregation must be altered ..."

This statement in Kelley was quoted with approval in Davis v. School District City of Pontiac, Inc. 443 F 2d. 573, 576, (6th Cir. 1971); Robinson v. Shelby County Bd. of Educ. 442 F 2d. 255, (6th Cir. 1971); and Kelley v. Metropolitan County Board of Education, 436 F 2d 856 (6th Cir. 1970).

In the Lane situation, there is no question that the Board of Education had awareness of the situation, the power to act and the expertise to develop a feasible plan. In Davis v. School District of City of Pontiac, Inc., 309 F Supp. 734, 741-742, the Court stated:

> "When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission. . . . The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil."

The development at Lane was neither secret nor surreptitious. It was not the result of demographic changes "helplessly submitted

beyond the reach of feasible compensatory planning." (76a) Cf. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26-27 (1971).

The Appellants rely upon Offerman v. Nitkowski, 378 F 2d. 22 (2d Cir. 1967) which held that communities have no constitutional duty to undo bona fide de facto segregation. The Appellants state that the Lane Zone had not originally [Emphasis added] been created as a segregated school nor did the Board in any way change the district lines in order to create and maintain racial imbalances. To sustain this position they cite Taylor v. Board of Ed. of City Sch. Dist. of New Rochelle, 294 F 2d. 36, 39 (2 Cir. 1961), Cert. den. 368 U.S. 940 (1961), Davis v. School Dist. of the City of Pontiac, Inc., supra, and United States v. Board of School Commissioners of Indianapolis Ind., 474 F 2d 81, 84 (7th Cir. 1973), cert. den. 413, U.S. 920 (1973) in that in these cases the Boards intentionally creates racially segregated schools and perpetuated said racial segregation.

Those cases can be distinguished from Lane in that although the school zone was not intentionally so created, since 1964 the Board

> "countenanced and sought to compensate for a known and intensifying racial and ethnic imbalance in Lane, but has failed to accord the school districting that can be justified by any standard relevant to education or neighborhood or geographical considerations or to overriding community interests or to continuity in education . . ." (928-929)

Webster's Collegiate Dictionary - Eighth Edition (1973) p. 259, defines countenance as follows: "to extend approval or toleration to: sanction (synonymous cross-reference)." Sanction is defined as follows: "1. to make valid or binding usually by a formal procedure (as ratification); 2. to give effective or authoritative approval or consent to." p. 1023

The Board, finally, acting under the Order of the District Court, dated May 16, 1974, submitted a feasible rezoning plan exhibiting the expertise that it is always had, whereby, portions of the Lane Zone were extended northerly and easterly into Queens, and the western end of the zone reduced. Those children in the removed western area would go to schools which were not racially imbalanced. Annexed hereto is the map of the redrawn zone which was part of the District Court's Order of August 8, 1974 (1254) which did not appear in the Appendix. This is similar to Bradley v. Millekin, 338 F. Supp. 582 (E.D. Mich 1971) in which redrawing of lines in an east-west direction resulted in greater desegregation.

The Appellants rely on Keyes, supra, Soria v. Oxnard School District, 488 F 2d 579, 585 (9th Cir. 1973), and Johnson v. San Francisco Unified School District, 500 F 2d 349, 351 (9th Cir. 1974) in that the plaintiffs must prove that the segregated condition was brought about or maintained by intentional state action. It is claimed by the Appellants that the District Court did not find any intentional state action.

Though the Plaintiffs must establish, that the segregation which exists was, to a significant degree, caused or maintained "intentionally" or "purposefully", it does not change the view of this Circuit that a racially discriminatory motive need not be established;

> "It is now well established that the plaintiff alleging unlawful discrimination in violation of the equal protection clause to the Fourteenth Amendment is not required to prove that a discriminatory motive preceded the unlawful effect." [Emphasis added].

See: Pride v. Community School Board of Brooklyn, New York School District #18, 482 F 2d 257, 265 (2nd Cir. 1973).

The Appellants, by relying on their stated position of not having a negative or neutral approach to the issue of racial school policy and, in fact, having a stated affirmative integration policy, seem to imply that in order to establish the necessary intent or purpose of an action which cause segragation, the Appellees must prove a racially discriminatory motive as well.

A reading of Keyes, supra, to support such a position is inconsistent with previous Supreme Court decisions.

In Hart v. Community School Board, supra, at 737-738, the Court stated:

> "As a practical matter it is exceedingly difficult, if not impossible, for a court to ascertain legislative or even executive motive. More to the point, it is virtually impossible for a court to devine the collection of motives which underlies a multi-member school board's various administrative decisions. The method of judicial inquiry is not well suited to group psychoanalysis. As the Supreme Court has pointed out:
>
> > As we said in Palmer v. Thompson, 403 U.S. 217, 225, (91 S.Ct. 1940, 1945, 29 L.Ed. 2d 438) it "is difficult if not impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and the same may be said of the choices of a school board's action(s). . . . The existence of a permissible purpose cannot sustain an action that has an impermissible effect. Wright v. Council of City of Emporia, 407 U.S. 451, 461-462, 92 S.Ct. 2196, 2203, 33 L.Ed. 2d 51 (1972) (emphasis added). See Keyes v. School District No. 1, Denver, Colorado 413 U.S. 189, 323-334, 93 S.Ct. 2686, 2710, 37 L.Ed. 2d. 548 (1973) (Powell, J., concurring). ("This Court has recognized repeatedly that it is 'extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.' . . .)"

It should be noticed that neither Soria v. Oxnard School District, supra, and Johnson v. San Francisco, supra, do not define segregatory intent which, under Keyes, must be established in order to find constitutional liability for the creation and maintenance of a school facility.

In Oliver v. Kalamazoo Board of Education, 368 F Supp. 143, 161-162 (W.D. Mich. 1973), the Court discusses intent, as follows:

"Under Keyes, defendants must not only have caused the schools to be segregated, but must have intentionally caused them to be segregated. Ascertaining the board's intentions is certainly difficult, but it is not al all impossible.

The starting place is the standards and processes evolved by the common law for determining the relevant state of mind of the defendant, or defendants, in an intentional tort suit. In general, it is reasonable to infer that people intend the natural and probable consequences of acts knowingly done or knowingly omitted. Thus in a case tried to a jury, it would be proper to instruct that:

> 'In the absence of evidence in the case which leads the jury to a different or contrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done, or knowingly omitted, by such person. An act, or failure to act, is knowingly done, if one voluntarily and intentionally, and not because of mistake or accident or other innocent reason.' (footnote omitted).

Since intent may be proved by direct, indirect or circumstantial evidence, all the facts and circumstances in evidence in the case which may aid in the determination of state of mind may be considered. (footnote omitted)."

There is one very important piece of evidence that has not been discussed which goes to the very heart of the question of intent. The policy of the Board was to contain Lane as a segregated school zone, rather than alter the zone lines which it could have done since 1964. The policy, which has been proscribed by the Supreme Court, United States v. Scotland Neck City Bd.of Ed., 407, U.S. 484, 491. (1972) was one in which the Board would not

alter lines for fear of loss of "others" if minority children went to "other" schools, commonly called white flight. The District Court found as follows:

> "It appears to be the fact, and the administration of the defendant Board treated as a factor relevant in their policy making, that there is a relationship between the composition of the population of a particular school and the trend of population in the neighborhood or area which the school serves or is meant to serve. That is, the tendency of people with children of school age to emigrate from the city appears to increase if parents observe that the schools to which they must expect their children to be assigned show an increase in ethnic populations diverse from their own. Hence the administration of the Board inclines to the belief that if the percentage of blacks and Puerto Ricans in school's population visibly increases, that creates a tendency to accelerate the diminution in "other" population of the school through voluntary withdrawal of "other" students from the school by family emigration or by transfer of students to private or denominational schools." (910)

* * *

> "The Board has evidently reconciled or resigned itself to the view that the entire school population of the city will be in marked imbalance from an ideal point of view because of the exodus from the city of parents with children of school age who yet continue to be a part of the total metropolitan economy." (920)

It was very clear, that even though Keyes, was decided after the trial of the instant case that intent was a consideration of the parties and the District Court throughout the proceeding.

The District Court's language as to its findings, is very clear and concise. The Court referred to the unmistakably advertent action of this Board over the years that countenanced

a known and intensifying racial imbalance. The Board failed in the words of the Court to accord the school districting that can be justified and its direct effect in producing an imbalanced school population. The Board had treated Lane as a school primarily districted in a pattern for Brooklyn Schools, rather than as part of the complete pattern of all schools, without reference to borough lines or borough-oriented administration. It is interesting to note that within six weeks of the order of the Court the Board produced a feasible plan.

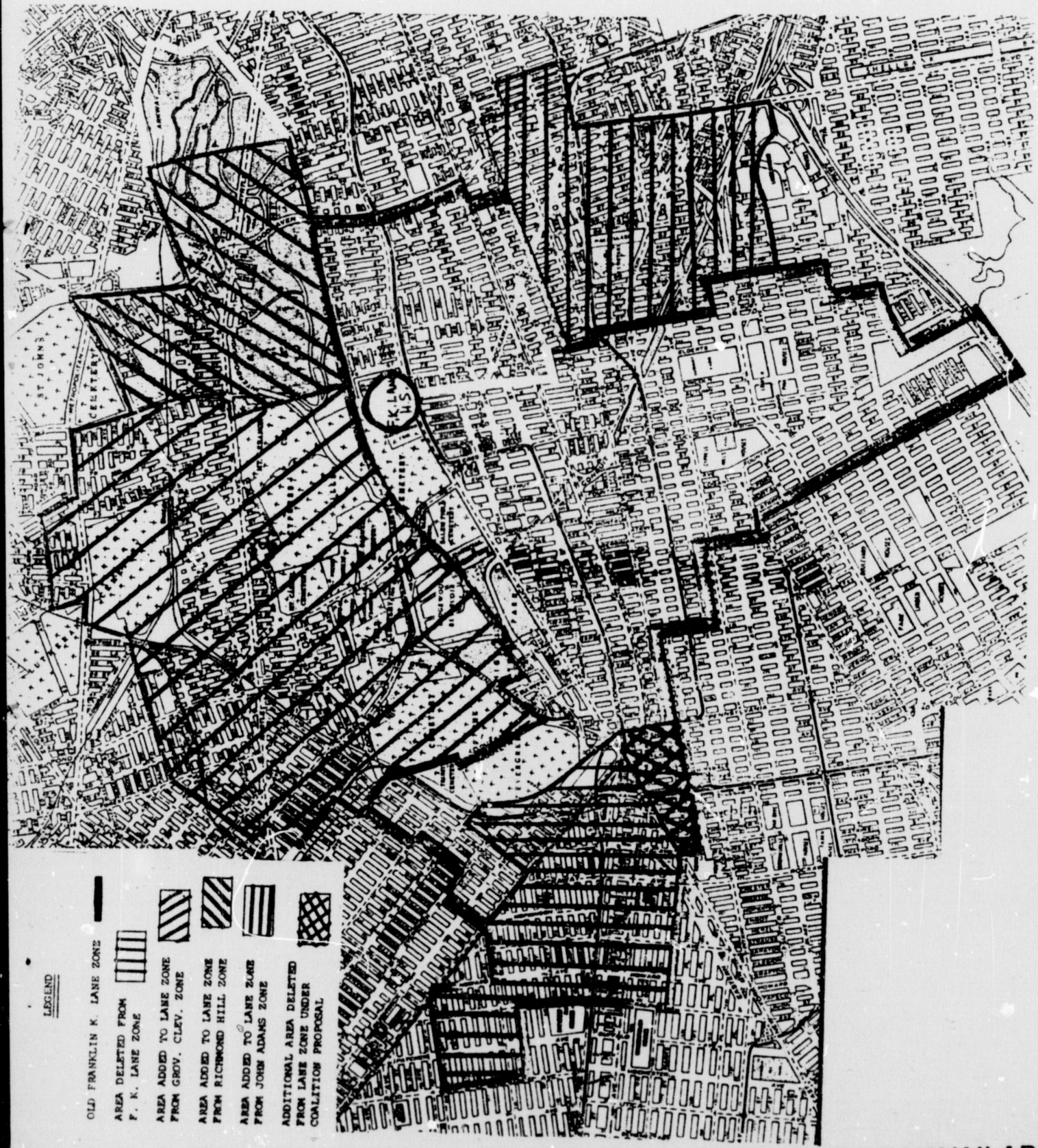
CONCLUSION

The decision and Order of the District Court in finding that the zoning of Franklin K. Lane High School constituted unconstitutional de jure segregation was correct on the facts and the law and that the decison and order, and the judgment entered accordingly, should be affirmed.

Respectfully submitted,

MORTIMER TODEL
Attorney for Plaintiffs-Appellees

ZONING MAP



UNITED STATES COURT OF APPEALS: SECOND CIRCUIT

Index No.

De FELICE, et al,
Plaintiff-Appellants,

- against -

BD. OF ED, et al,
Defendants-Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the 27th *day of* January *19*75 *at* Municipal Bldg., New York

deponent served the annexed Appellees Brief *upon*

Adrian P. Burke

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 27th
day of January *19*75

Robert T. Brin

James Steele
JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975